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Liberalism's Public/Private Split

Betty Mensch and Alan Freeman

Nothing is more central to our experience in American culture than the split between public and private. It is the premise that lies at the foundation of American legal thought, and it also shapes the way in which we relate to one another in our daily lives. We take for granted that there is a public realm and a private realm. In the private realm we assume that we operate within a protected sphere of autonomy, free to make choices and to be secure against the encroachment of others. Private law (e.g., contract law) serves as a helpmate in this realm, facilitating and ensuring the autonomous world of private decision-making. In contrast, the public realm is a world of governmental institutions obligated to serve the "public interest" rather than "private" aims. For the most part, the public realm is accountable to the private, and it is obligated to limit its intrusion into the world of private choice; but occasionally it is supposed to override the private sphere, either to serve a greater public good or to solve problems that are poorly or deficiently handled by private decision-making.

While it is important to recognize the role of the private/public split in legal thought, its real significance lies in the powerful way it informs our daily experience. Part of our reality is to "know" that the public realm is different from the private, that these realms are both "there" and separate from each other, with different things happening in each one. That knowledge, in turn, molds even our closest relationships. We were reminded of this fact recently during a phone conversation with a good friend. We had just produced a new baby, a fourth son in our busy household, and our friend said she hoped we would now stop reproducing. Then she quickly retreated into apology, afraid she had offended us. At first her fear seemed puzzling, but then it made sense: In our culture one is not supposed to tell people what one thinks of their reproductive behavior. Family planning choices take place in the world of "family privacy," which is a world of private, autonomous decision making. Even friends are expected not to intrude into that protected sphere; to do so is to violate the norms of privacy. Our friend's apologetic manner is what we

mean by taking the public/private split for granted as part of our daily experience.

A few moments of reflection, however, show the extent to which that supposed realm of privacy is a product of cultural contingency, not objective reality. Since reproduction, for example, is the process by which a society reconstitutes itself, many cultures consider family planning an obvious matter of social concern and choose accordingly either to encourage or discourage the creation of large families. Even in cultures where sexuality and reproduction are ostensibly "private," our experience of them is socially constituted. Unless one is prepared not only to head for the wilderness, but also to discard all previously acquired cultural baggage, the notion of raising children in "pure privacy" is an impossibility. We look, often frantically, to the social realm for guidance and understanding of parental roles. That we turn to Dr. Spock and other experts when we have difficulty as parents underscores the social dimension of our experience.

Once the public/private split is recognized to be merely an artificial construct, new possibilities for human contact arise. Where one erects walls of privacy around oneself, one is denied access to others. Privacy means alienation, and if some of these walls of privacy were dissolved and traditionally private questions were transformed into community concerns, then we might feel more connected to others. Our sense of ourselves and of others would change, and our world would, in turn, be altered.

Instead of attempting to transform the public realm into a genuine community, many of us seek authentic experiences by retreating into the private realm—by using the private realm as an antidote to the alienating world of competitive, possessive, individualism. Thus, in the words of Christopher Lasch, the family is experienced as the "haven in a heartless world." Similarly, many of us try to find true meaning through religious experience and the social life that accompanies it. Finally, many of us think we achieve genuine interpersonal connection in the most private realm of all, when we fall in love. Yet the relegation of these experiences to the realm of privacy always serves to limit their significance. Because they are private they are trivialized and rendered irrelevant to the "real world."

Nevertheless, because our world is dominated by the forms of liberal legalism through which we bear "private rights," the rhetoric of militant privatism has provided

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an important weapon in certain battles. As the Bork hearings illustrated, a threat to our "right" to privacy induces widespread fear and discomfort. It is true that in the abortion area gaining the right to private, autonomous reproductive choice has seemed an important feminist victory. Yet the language of privatism is a double-edged sword. As women who struggle alone to raise children know, reproductive choice conceived only as a private right serves to isolate and deny the woman's claim for communal help and shared responsibility. To have "private" choice is also to be left alone with it. Moreover, in the economic realm the rhetoric of privacy has traditionally been used to transform the social dimensions of poverty into a fantasy about autonomous choice in which poverty results from individual failure. It is therefore not surprising that the formal freedom to obtain an abortion does not mean the right to have one paid for by the community; the poverty of the woman who cannot afford an abortion is her own "private" problem. That was the lesson learned when the supposedly liberating *Roe v. Wade* was followed by *Harris v. McRae*, which entitled the government to deny health benefits to low-income women to cover the expenses of even "medically necessary" abortions.

Thus, within liberal legalism privacy may be a weapon to gain freedom from others in the short run, but it may provide the justification for abandonment of the individual by others in the long run. This "short-run, long-run" problem can best be understood against a more general theoretical backdrop. For the purpose of understanding the ideology of private rights, nothing has really improved upon Marx's classic account in his early essay, "On the Jewish Question." Despite the essay's somewhat heavy, dated, Hegelian terminology (state and civil society rather than simply public and private, for example), and its at times blatant anti-Semitism, it still remains the fullest account of liberal ideology.

Marx starts by describing the emancipation of the political state from the yoke of traditional status and power. Under the old feudal, hierarchical model, political life was inseparable from social privilege based on religious, economic, and class background. Because political status was bound up with social status, religious and property qualifications were attached to the right to vote. In contrast, citizenship in the liberal state is freed of these qualifications: As citizen, the Jew is as free as the Christian, and the poor person is on an equal footing with the landed aristocrat. Thus, the state becomes the arena for the exercise of free political participation and the realization of true community. In this sphere, at least, alienating religious and class divisions are dissolved. This liberation of the

state has been "a great step forward," a step away from separateness and toward community (or, using Marx's term, "species being").

Nevertheless, the emancipation of the state has not brought complete human emancipation because the old distinctions have been retained "outside" the state, in the form of private rights. Thus, religion, rather than being abolished, becomes a "private whim," an expression of purely subjective, individualized value. Similarly, while property is no longer a prerequisite for political participation, it is nevertheless retained as a protected right with which the state cannot interfere. Property as a private right, stripped of the old notions of moral/political obligation (e.g., the feudal lords to their serfs), both presupposes and legitimates a realm of egoism, self-interest, and atomization—i.e., the market. In that sphere there is only *bellum omnium contra omnes*, which, as Marx says, is "the essence not of community but ... of division."

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Marx insists that he is describing actual historical changes that took place when liberalism emerged, but he is also describing a change in consciousness, in the way that people experience the world. The split between public and private lies at the heart of that liberal consciousness, for it means that we simultaneously view others both as fellow citizens in a true community and as separate, antagonistic private others. Thus, as Marx says, "man leads a double life ... [I]n the *political community* he regards himself as a *communal being*; but in *civil society* he is active as a *private individual*, treats other men as means, and becomes the plaything of alien powers." [Marx's emphasis]

Moreover, because the most important daily activities—work, family life, and moral choice—are all experienced as private and apolitical, the experience of community becomes increasingly abstract, realized at the level of fantasy and ritual rather than as concrete reality. Most "citizens" have little direct experience of participation in collective decision-making, so each of them becomes an "imaginary member of an imagined sovereignty." The "state," too, becomes an abstract, alien other, rather than an arena for the experience of community.

Significantly, the public/private split also reproduces itself *within* the realm of the private, doing so most

starkly in the market/family dichotomy. In theory, the market offers an arena for atomized, competitive self-interest, while the family provides a place for warmth, selflessness, and interconnectedness. Thus conceived, that dichotomy in turn represents the conventional, stereotypic split between male and female roles. For in the market, the most public and powerful of the private realms, men can play out their “maleness” by being aggressive and domineering, while women, contained within the family sphere, play out their female roles by providing a safe, nurturing home. Thus, the traditional rigidity of gender identification is inextricably linked to the supposed boundary between market and family, which in turn is an integral subset of the basic liberal split between public and private.

A crucial ingredient in liberal ideology, as described by Marx, is the fact that the public/private split actually entails a tripartite structure of self, state, and other. Because of that structure, there is always an alienating third that mediates the relationship between self and other. Other “private” individuals are experienced, not in direct relationship, but rather by reference to a state that sets the ground rules of the relationship, determining the extent of each person’s rights and duties. In every relationship the state is a potential ally and a potential foe. At the same time, each individual experiences others simultaneously as citizens—part of the collectivity—and as private rights-holders. The state can never be simply the community because the community is composed of individuals who also define themselves as rights-holders with private interests potentially at odds both with the interests of others and with the collective experience. Just as each of us leads a “double life” as citizen and private rights-holder, so too do we constantly experience others, not as unified wholes, but as members of the “democratic” collectivity, on the one hand, and as atomized individuals on the other.

There are four important notions that, in tandem, help to maintain this triadic structure within our consciousness—to make it, in other words, powerful as ideology. These four notions can be called limit, illusion, legitimation, and contradiction. They operate simultaneously at the level of legal thought and at the level of day-to-day consciousness.

The first, the notion of limit, means that there is a line separating public from private, a boundary where one ends and the other begins. That line can be moved dramatically over time, and it can sometimes be hard to find or quite fuzzy around the edges. But the key point is that the line is always present *somewhere*. On the public side of the line we assume that there is an obligation to act responsibly, with a sense of accountability to others. The existence of a boundary, however,

means that at some point accountability ends.

The “state action” cases are all cases about this dual message of responsibility and limit. In these cases, the Supreme Court has been called upon to interpret the provision of the Fourteenth Amendment mandating that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” That provision makes racial discrimination a matter of public concern if the entity responsible for the discrimination can be regarded in some sense as the “state,” i.e., public not private. In many instances the line between state action and private action has shifted dramatically, often in ways we consider progressive.

One can applaud, for example, the change in this doctrine between the 1880s and the 1960s. In 1875, Congress enacted a law barring racial discrimination in places of public accommodation (hotels, theaters, etc.). In the *Civil Rights Cases*, however, the Supreme Court, invoking classic public/private assumptions, declared that the statute was an unconstitutional intrusion into the sphere of private social life. The limit to public accountability had been exceeded, since the Fourteenth Amendment prohibits discriminatory action only by the state. Not until the modern civil rights movement almost a hundred years later would similar legislation again be enacted; then, as we know, it was upheld.

Yet the change did nothing to undermine the basic proposition that there is a line beyond which it is inappropriate to hold the public accountable for racially discriminatory results. Thus, despite all of the legal advances in the area of antidiscrimination law, it is still legitimate to treat concrete social facts, such as continuing high rates of unemployment among minorities, high poverty rates, and basic exclusion from mainstream American life, as somehow outside the sphere of direct public responsibility.

The notion of a limit on accountability works powerfully, not just in setting legal limits, but also in shaping our responses to the world. It allows us, for example, to interpret the social reality of minorities trapped in ghettos as a fact of private rather than public life, and therefore outside the range of our direct responsibility. As a result, empathetic responses (“I’d have a really hard time raising my children in those conditions too—I’d hate to see them feeling trapped and hopeless about the future”) are always distorted by the assumption that the reality being witnessed is in the private realm—that it is shaped by free choice and is not the result of public coercion.

This is not to say, of course, that the notion of privatism is the only distancing mechanism shaping our perceptions. The feudal model of divinely ordained hierarchy, now supposedly defunct, remains alive in the form of stereotypical assumptions about lower classes,

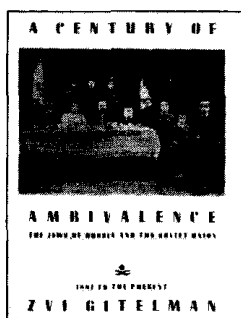
women, and minorities. "They" are not really like "us"; they are not bothered by conditions that would bother us; it is more natural for them to live like that.

Another vestige of the hierarchical view can be found in our modern notion of merit. A sophisticated version of divinely ordained hierarchy, one more consistent with the public/private split, this notion assumes that there is a natural ordering of abilities—one independent of class, sex, or race—that determines outcomes in a free society. Given equal opportunity, the skillful, the daring, and the hardworking will be the ones who come out ahead. The belief in objective merit, however at odds with reality, has of course played a key role in the ideology of the free market—success in the marketplace reflects "natural ability" rather than socially constituted hierarchy.

Even if we reject all such assumptions about the legitimacy of social hierarchies, we still may be unable to transcend the distancing effect of the public/private split. In fact, we are almost inevitably trapped by it. Should we attempt to recognize that the problems of others are our concerns, we would hardly know how to begin to cope with them. In the absence of genuine shared communal responsibility, gestures of concern are quickly turned into idle, private, and frequently condescending acts of charity. If we donate money to "toys for tots" or to the church soup kitchen, we are, to be sure, providing a toy for a child, or a meal for a hungry person, but we are also affirming the regime of nonresponsibility that makes the act of charity one chosen by subjective whim. Given the public/private split, we are *forced* to be selfish as much as we choose to be selfish, for in the absence of real community, our communal gestures can only be privately expressed. In the private realm, where free choice is presumably protected, none of us is free to choose the rejection of privacy itself because others will quickly respond to such efforts as intrusive, threatening, or simply crazy.

This lack of freedom to choose a community of real sharing is closely connected to the second notion that makes the public/private split so effective—illusion. The existence of a public realm allows us to believe that, the force of the private sphere notwithstanding, in the public sphere we are *together as citizens*, participating equally and fully. The public realm constantly holds out the possibility of community even while the reality of daily life denies it. Because that daily denial is so pervasive, the ideal of public community must constantly be affirmed through the social production of imagery in order to prevent us from directly confronting our loneliness and isolation. We must have the illusion of communal experience, even if reality does not bear it out. The media have become especially effective conveyors of this illusion, for the shared television

Soviet Jewry in history and folklore

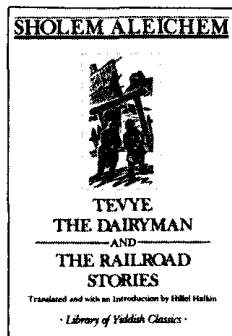


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viewing of national events provides the feeling that we are all participating in national life. Although in fact we are only passive viewers of an image, we feel that we are joined with others, taking part in the life of the country. The recent Miss Liberty and Constitution Bicentennial celebrations provided ceremonial versions of that illusory experience, but so-called national tragedies also have a similar effect. President Reagan has been especially adept at using funerals for this purpose, simultaneously masking underlying problems of corruption and ineptitude, as in the space shuttle explosion.

As Reagan also demonstrated in his first years in office, the illusion of the public community can be strengthened through the identification of enemies. We have seen him create such enemies in Khomeini, in "International Terrorism" and, most effectively, in Khadafy. Figures like Khadafy serve a useful ideological purpose: However separate and private we are otherwise, we, "as a nation,"—as members of an illusory community—can share our hatred for him.

Strengthening the image of public togetherness in turn facilitates the third notion associated with the public/private split—legitimation. With the illusion of togetherness intact, we deem it acceptable to be acquisitive and competitive in the private sphere, to scorn others and to take advantage of their weaknesses. Disparities of wealth and power that result from this social and economic *Bellum omnium contra omnes* are by definition legitimate because they are a function of private, autonomous choice, not the public exercise of political power. To redress these disparities would be to invade the protected sphere of private rights.

Legitimation requires an elaborate structure of law to maintain the theoretical distinction between public and private activity. It is the conception of legally enforceable rights that gives credibility to the assumption that private activity is in fact purely private, so that the exercise of private power does not appear to be publicly sanctioned oppression. Thus, public law is to be distinguished from private law—property, torts, and contracts—which simply facilitates the private ordering of social and economic life. Private law doctrine is thus a long and detailed meditation on the idea of protected free choice within a fixed and judicially determined limit. Legally determinable rights ensure that each person is secure against both public coercion and oppressive private power.

Private rights, however, are, necessarily, not only about freedom, but about exclusion as well. The positive side of free choice always carries with it a negative flip side: This is mine, therefore it's *not* yours. I've got it so you *don't*. Similarly, while there is a positive side to

recognizing the other as a rights-holder ("I respect your autonomy, your right to make your own choices"), there is a negative side as well, because rights are premised on the denial of the freedom to share. ("Because you have it, it's not mine; because it's yours, I cannot have it without your consent.") Of course, a major premise of traditional marketplace theory is that "consent" is something that must be purchased, experienced as a barrier, thereby alienating the other from oneself.

In truth, the line between public and private is logically incoherent, and this incoherence has been apparent since the Legal Realist movement of the 1920s and 30s. The realist scholars, part of the general twentieth-century revolt against formalism and conceptualism, convincingly undermined all faith in the objective existence of "rights" by challenging the ideological premises upon which the public/private distinction is based.

Property, for example, is thought to be the paradigmatic private right. In his famous essay, "Property and Sovereignty," Morris Cohen pointed out that property is necessarily public, not private, since "property" means the legally granted power to withhold from others; and as such, it is created and protected by the state. In short, property law is simply a form of public law. Similarly, with respect to freedom of contract, the power to exclude or withhold is central to the supposedly freely-entered bargain. Free consent to the other's terms is in fact forced consent, for it derives from the other's legally sanctioned threat to withhold what is owned except upon the demanded payment. It is the state that delegates the power to exclude and therefore to set the terms: without public coercion, there would be no private freedom of contract. Thus, the line between private right and public power dissolves—the former collapses into the latter.

Despite its apparent incoherence, however, the language of public and private persists, both in legal discourse and as part of our experience. Its continuing viability and power to legitimate may be due, in large part, to its manipulability. Precisely *because* it has no logical content at all, it can easily be turned inside out. The legal literature is filled, for example, with theoretical invocations of public welfare to justify the consolidation of hierarchical property relations. Thus, in the typical exclusionary zoning case, the supposedly free private market would allow developers to subdivide building lots and erect cheap housing in otherwise fancy (usually all-white) neighborhoods. In such situations, the "community" is allowed to establish rules to prevent the erection of such cheap housing, despite the fact that the community with its "police power" is being invoked simply to reinforce private acquisitive, racist behavior.

Similarly, the public purpose doctrine has been invoked repeatedly to justify subsidies to enterprises that

otherwise claim the right to be treated as private. Historically, railroads were notorious beneficiaries: the state's eminent domain rights were granted to railway companies on the theory that the public would benefit from an expanding transportation system, even while the companies of course retained their right to a "private" profit.

Modern examples abound. Conventional free market ideology extols the virtues of private capital accumulation, entrepreneurial skill, and the harsh reality of risk. Yet tax breaks are routinely granted to entice industries to invest or remain in localities, cities compete for the opportunity to provide sports teams with ever more luxurious stadiums, and huge companies get government help when they face financial ruin. Private companies rarely turn down the opportunity to eat greedily from the public trough.

Two recent cases serve to illustrate the point. In the first, *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court invoked the public character of large private enterprise in allowing a whole neighborhood in Detroit to be destroyed, at huge personal cost to displaced neighborhood residents, so that General Motors could build a plant on that location. The theory was that public good would result from the plant's opening because the plant would provide jobs. Ironically, however, in *Local 1330, United Steelworkers v. U.S. Steel*, an appellate court affirmed the privateness of large corporations and refused to stop the closing of two plants in Youngstown, Ohio, despite the court's stated awareness that the move would cause "an economic tragedy of major proportion" in the area. Rejecting the argument that the local community had gained a recognizable property interest or community "right" in the plants over the years, the court held that because the company was privately owned, its economic decisions were beyond public reach.

The point here is not that the courts were wrong in attempting to make their public/private decisions, but rather that *anything* can be described as either public or private. Decisions during the 1985–86 Supreme Court term illustrated that point vividly. The Court refused to hold airlines sufficiently "public" to be required to comply with antidiscrimination laws with respect to the treatment of the handicapped, despite the quite apparent subsidization of commercial airlines through the air traffic controller system (a "public" service, as Reagan was at pains to point out when the controllers went on strike and he fired them, which he could not have done if they were in the "private" sector). Then, only a couple of weeks later, in the famous *Bowers v. Hardwick* case, the Court announced that even voluntary consensual sexual acts were not sufficiently private to preclude state regulation. While the act that was upheld was

apparently directed at homosexuals, on whom the Court has never conferred "rights" as such, the Court did not seem to preclude regulation of sexual acts even between husband and wife. In effect, that which seems the most private was declared public, while that which seems (as we stand in line at a busy airport waiting for a security check) most public, is declared private. Paradoxically, the legal system defines the world for us as public and private; and then, through its particular definitions, it is free to stand in dramatic contrast to our daily experience.

The indeterminacy of the public/private split is closely related to the fourth associated notion—contradiction. As the airline/sexuality pairing demonstrates, neither the public nor the private category has any objective content. As a result, contradictory arguments about private rights can always be generated. As a matter of pure logic, nothing is excluded from the state's legitimate concern for the public welfare. Similarly, as between two conflicting private rights, logical arguments can always be made for either side. My private right to be secure from the invasion of a nuisance, like the smelly chemicals you spray on your lawn, conflicts with your right to use your property freely. My right to be secure from oppressive competition conflicts with your right to engage in unbridled freedom of contract. In each instance, the state must choose between two mutually exclusive rights.

In the economic realm the rhetoric of privacy has traditionally been used to transform the social dimensions of poverty into a fantasy about autonomous choice in which poverty results from individual failure.

Others have written about the problem of contradiction, which belies the legal system's claim to be a neutral protector of rights. Contradiction also is manifested in our personal experience—in our sense of how we should relate to others. The contradiction between market freedom and security of expectations that pervades private law discourse reflects deeply held beliefs about how we should act in the world, beliefs that are ultimately contradictory. On the one hand, we believe that we should be free to take advantage of another's weakness in the market, but on the other hand, we feel obliged to respect the interests of others. First-year law students are genuinely troubled when they discover that contract law, for example, does not have a convincing answer to the question of where

self-interest ends and concern for another's security begins. What their unhappiness reveals is that they believe in *both* the free exercise of self-interest and in the good-faith protection of others. They then find themselves feeling immobilized: in the face of evident contradiction, how can one make a strong moral choice? The same feeling that law students begin to recognize self-consciously is experienced by most people as an unarticulated sense of moral immobilization.

The fact that contradiction undermines the legal system's claim to be a neutral protector of rights also intensifies the degree to which the triadic structure of state/self/other pervades our relationships. At any given time, one's position with respect to another has to be seen as a function of a series of logically incoherent choices the state has made, choices that sometimes are favorable and sometimes antagonistic. If you complain about your neighbor's barking dog, the police may give your neighbor a hard time, or they may tell you that "life is like that." They may show up next time, having been called by your neighbor, to make you mow your overgrown weed-filled lawn, or you may convince them that you are an ecologist legitimately exercising your right to experiment with "natural" lawn. The fact that these choices cannot be preordained or logically compelled makes us feel the state's power all the more acutely.

As women who struggle alone to raise children know, reproductive choice conceived only as a private right serves to isolate and to deny the woman's claim for communal help and shared responsibility. To have "private" choice is also to be left alone with it.

It is common, however, especially among liberals, to consider problematic certain parts of the public/private distinction, while at the same time assuming that there is some core meaning to the notion of privacy, one that is natural rather than simply a creation of legal/political ideology. Thus, one might quite willingly concede that Con Edison is not obviously and perfectly private, but what about my home, my body, my thoughts?

Even in such cases, however, the supposed core right

to privacy can be collapsed into contradiction. Thus, my freedom to keep a goat in my home and yard conflicts with my neighbors' collective right to be secure in the respectability of the neighborhood in which they have invested; and one person's right to the free enjoyment of sexual fantasy conflicts with another's right to be secure against the degrading and exploitative use of bodies. Moreover, as in the market, so too, even within the family, we can have no faith in the supposed purity of private, subjective consent, for consent is always in part a function of social roles and expectations. A wife's consent to sexual relations with her husband, for example, is in part publicly constructed, for in every instance we all, inescapably, act out the social representations of the roles assigned to us—the wife's consent is inevitably consent by a person who thinks of herself as "wife," and this publicly created consciousness informs even her most private, subjective decisions.

If the structure of private rights and state power renders incoherent the vocabulary of rights, how then can we affirm the values that seem most important to us? Feminists, for example, feel deeply divided on the question of pornography. In light of the debasing use of female bodies, we are tempted to seek protection. The state should guarantee our security against such exploitation irrespective of the pornographer's invocation of a private right to freedom of speech. Yet the same state that might side with us now could also end up as the ally of the Phyllis Schlaflys of the world who wish to oppress us with their conventionality. And the same First Amendment invoked by our exploitative enemy may in the future protect us against state power.

Is there, even imaginably, a radical alternative view that does not require us to go on living the public/private split? Two related agendas suggest themselves. One is to recognize that the decision to employ the rhetoric of privacy is just that, a strategic move, and that the real solution is to end the relations of power that permeate our society. From that perspective, the issue is not privacy as such, but how to fashion a world without our current hierarchies of power, one of which is the physical abuse of women by men. That suggests the other agenda—the fashioning of communities where one need not hide behind the "private" either for protection or self-aggrandizement, where relationships might be just "us"—"you, and me, and the rest of us"—deciding for ourselves what we want, without the alienating third of "the state." In that setting, however remote it may seem, we might even make group decisions about reproduction, replacing our pervasive alienation and fear of one another with something more like mutual trust, or love. □